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Future Interests--Rules Against Perpetuities--Construction of Interest as Vested or Contingent

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controversy to be resolved in a single suit in order to conserve judicial time and effort.

Edward Andrew Zagula

Future Interests—Rule Against Perpetuities—Construction of Interest as Vested or Contingent

The residuary clause of *T*'s will provided that the balance of his estate was to go to his wife, *W*, for her lifetime, and then to his two daughters, *X* and *Y*, for their lifetime, "and upon their death their share is to be divided equally between their children when they reach the age of 25 years." *T* left surviving him *W*, *X*, *Y*, and five grandchildren who were all minors. In an action to construe the will, the trial court held that the remainder interest to the grandchildren was void because it violated the rule against perpetuities. *Held*, reversed. The remainder in fee vested in the infant grandchildren at testator's death, subject to open so as to make room for any children thereafter born to testator's daughters. At the death of the daughters of the testator the quantum of interest of each of the grandchildren will become fixed and certain. The grandchildren will be entitled to possession immediately upon the death of the daughters, and, according to the wishes of the testator, the property is not to be partitioned and allotted to the grandchildren until they reach the age of 25 years, or until the death of their mother, whichever is later. *Wachovia Bank & Trust Co. v. Taylor*, 120 S.E.2d 588 (N.C. 1961).

The principal case presents an interesting problem of construction on which the courts are not entirely in harmony. The first issue which arises in these cases is whether the words, "when," "at," "after," and other similar words, make a testamentary gift contingent. For if the gift is contingent, the rule against perpetuities will invalidate the gift if it is possible that the gift might not vest within lives in being and 21 years thereafter.

The early English decision in *Clobberie's Case*, 2 Vent. 342, 86 Eng. Rep. 476 (C.P. 1676), laid the groundwork in this area of the law. The court there held that, if there be a gift to *A* to be paid at the age of 21, the interest in *A* is vested; but, if there be a gift to *A* at 21, the interest in *A* is contingent. In the first case *A* owns the gift absolutely at the time it is made to him, but his enjoyment of the gift is withheld until he reaches 21. However, in

the latter case *A* does not own absolutely at the time the gift is made; there is a condition that *A* survive to be 21 before he takes.

The language of the conveyance in the instant case was "that upon their [daughter's] death their share is to be divided equally between their children when they reach the age of 25." In the absence of any language in the instrument leading to the conclusion that the gift was intended to vest at an earlier date, a direction to "divide" the fund among the children when they shall arrive at the age named will not save the gift from the operation of the rule against perpetuities. *Hooper v. Wood*, 97 W. Va. 1, 125 S.E. 350 (1924). In the *Hooper* case testator's will directed that ". . . after the death of [*X*], and when the youngest of [*X*'s] children shall have attained 30 years, the trustee shall divide all the property herein devised to them between and among said children" The court held that the devise violated the rule against perpetuities since the grandchild may be born after the testator's death and not reach 30 for over 21 years after the death of all lives in being.

The critical language in the residuary clause of *T*'s will in the principal case was "when they reach the age of 25." The court held that this language did not make the gift contingent on each grandchild's reaching the age of 25. In *Clark v. Union County Trust Co.*, 127 N.J. Eq. 221, 12 A.2d 365 (1940), the court said that it was a well-settled rule of construction that a gift of a legacy "at," or "when," or "after" a given event occurs, vests only upon the happening of the event. An exception to this rule was enunciated in a later decision: *Cody v. Fitzgerald*, 2 N.J. 93, 65 A.2d 750 (1949). In the latter case *T* devised to *W* for life. The will further provided that at *W*'s death, the children shall take equally. The court held that, while it is true that certain terms like "at," "when," or "after" often connote the time or event upon which legacies are to vest, where it appears from the entire will that the only reason for postponing the enjoyment of a gift is to let in some other interest, (i.e., *W*'s life estate), the gift is deemed presently vested.

The apparent conflict between the statement so often found in the cases that "when" and "at" are words of contingency, and the actual decisions to the effect that the gift is vested where these words are used, may be explained by the fact that there is generally a gift of intermediate income to the legatee or devisee. *In re Sessions' Estate*, 217 Ore. 340, 341 P.2d 512 (1959). The American cases support a presumption of a vested interest where there is a gift of realty or personalty to a person "at" or "when" he attains a given

age, and there is an intermediate gift of income to him, or an intermediate gift of a particular estate to someone else. *In re Sessions' Estate, supra*. It would appear that the North Carolina court is in accord with this view since there was an intermediate gift of life estates in the principal case.

Another problem of construction about which the courts are not entirely in accord is this: In construing an instrument do the courts prefer a construction which makes it good under the rule against perpetuities? Or do the courts first construe the instrument without any reference to the rule against perpetuities, and then apply the rule to the conveyance? The majority view appears to be the rule stated in *Prichard v. Prichard*, 91 W. Va. 398, 113 S.E. 256 (1922), wherein it was said that the rule against perpetuities is not a rule of construction but a rule of law. In making application of it to the provisions of a will, the true intent of the testator must first be determined from the language used in the will. If the instrument so interpreted offends the rule, it will be remorselessly applied, and such provision held invalid. The court in the instant case is in line with the majority in first construing the will and then applying the rule to the construction.

If the court in the principal case had found that the gift to the grandchildren was contingent on their reaching 25, the gift to them would have violated the rule against perpetuities. Examining the gift on the testator's death, it would be possible that a grandchild may be born just before the death of the life tenant, and this grandchild may not reach 25 for more than 21 years after the death of all lives in being. The general principle according to which the rule against perpetuities is applied to class gifts may be stated in two ways: (1) a class gift stands or falls as a unit—it cannot be split; (2) both the maximum and minimum membership in the class must be determined within the period of the rule against perpetuities. SIMES, FUTURE INTERESTS § 112 (1951). By the weight of authority the rule against perpetuities requires that the shares be ascertained within the period. Annot., 155 A.L.R. 698, 710 (1945). Since a grandchild may be born just before the death of the life tenant, the maximum interest of each grandchild may not be determined within the period of lives in being and 21 years. Therefore, if the clause “when they reach the age of 25 years” had been construed to make the gift to the grandchildren contingent, the gift to them would have failed.

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